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In the

Supreme Court of the United States.

October Term, 1930.

No. 490.

Frank L. Young Company,

Petitioner,

v.

McNeal-Edwards Company.

On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

REPLY BRIEF FOR PETITIONER.

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The fact that the respondent's brief does not follow the major outlines of petitioner's brief leads to the filing of this reply for the purpose of indicating the extent to which the arguments advanced in petitioner's brief are met or left uncontested.

FIRST QUESTION: APPLICABILITY OF MASSACHUSETTS STATUTE IN FEDERAL COURTS.

Respondent advances no argument on the question whether sections 2 to 4 of General Laws, chapter 227, are constitutional and applicable in the District Court for the District of Massachusetts. It relies solely upon Judge Bingham's opinion in the Circuit Court of Appeals (respon-

dent's brief, p. 5). There is no refutation of Judge Anderson's dissent in the Circuit Court of Appeals or of the arguments advanced in petitioner's brief, pages 8 to 34.

SECOND QUESTION: CONSTRUCTION OF THE MASSACHUSETTS STATUTE.

Respondent again argues that the Massachusetts statute, as a matter of construction, does not apply to these facts, since Frank L. Young Company brought a previous suit which it later discontinued. This argument is to be found partially in the "Statement of the Case" (pp. 1 and 2) and partially in the argument (pp. 4 and 5). This is the same contention that was twice advanced before the District Court and twice before the Circuit Court of Appeals. It is answered at pages 37 to 43 of petitioner's brief.

THIRD QUESTION: PETITIONER'S RIGHT TO RECOVER AS A MATTER OF CONTRACT LAW.

This seems to be the matter upon which respondent particularly relies, pages 6 to 10 of its brief being devoted to argument on this point. The following is a brief summary of petitioner's argument with notation as to the extent to which such argument is contested:

Petitioner's brief (pp. 50-52) contends that no defense based upon petitioner's breach of contract was in issue under the pleadings. This contention is not mentioned or refuted in respondent's brief.

Petitioner's brief contends (pp. 52-54) that under Rule 35 of the District Court, adopting Rule 44 of the Massachusetts Superior Court, no question of a breach by the petitioner was properly raised at the trial. Respondent notices this contention on page 10 by citing without argument the following three cases:

Chateaugay Iron Company, Pet'r, 128 U.S. 544, 553.

United States v. *U.S. Fidelity & Guaranty Co.*, 236 U.S. 512, 529.

Spokane & Inland R.R. v. *Campbell*, 241 U.S. 497, 502.

These cases tend to show that Massachusetts Superior Court Rule 44 is not adopted into the procedure of the District Court *by the Conformity Act.* Petitioner never contended that it was so adopted. We quote from page 54 of our brief: "The application of the Superior Court Rule 44, it should be noted, is not due to the Conformity Act, but to its express adoption by Rule 35 into the practice of the District Court."

On the merits of the question of contract law, petitioner's brief contends

(A) that under *Swift* v. *Tyson* this is the type of case in which the Federal courts are bound to follow the general commercial law (pp. 55-56). This is not noticed or contested by respondent's brief.

(B) that by the general commercial law only a substantial breach by the plaintiff of a promise going to the essence of the contract can bar recovery (pp. 56-60). This is not noticed or contested by respondent's brief.

(C) that the fact that a plaintiff's breach is "wilful" is immaterial, if the breach is unsubstantial or concerns a collateral provision of the contract (pp. 60-64). Respondent does not argue this question. But its brief *assumes* at page 6 that the present litigation is governed by *Sipley* v. *Stickney*, 193 Mass. 43, as if this case involved a Massachusetts contract (which it does not) and were being decided in the Massachusetts Supreme Judicial Court. It is further *assumed* (p. 6) that *Sipley* v. *Stickney, supra*, decides that all wilful breaches by a plaintiff bar recovery. That this assumption is unfounded, even with regard to the law

of Massachusetts, is argued at pages 60 to 62 of petitioner's brief.

Petitioner's brief contends that a breach by a plaintiff, whether or not "wilful," is no bar to an action unless it is substantial and goes to the essence of the consideration (pp. 54-64). If we are wrong in this, as respondent assumes, but does not argue, we contend in the alternative that on the facts of this case disclosed by the record there was no wilful breach by Frank L. Young Company (petitioner's brief, pp. 66-70). It is to this question of fact that respondent's only argument is addressed (pp. 7-10). It is pointed out at page 66 of petitioner's brief that there are two possible contentions that an intentional breach existed in this case: (1) The first possible contention is that there was an intentional breach by Frank L. Young Company in detaining the drums up to September 15, 1922. This was the view of the Circuit Court of Appeals. Respondent never has made this contention, and does not make it in this present brief. That such a contention is unsupported by the record is indicated in petitioner's brief at pages 67-68 and 76-79.[1] (2) The second possible contention is that the attachment of the drums on September 15, 1922, constituted an intentional breach. This is the view for which respondent argues at pages 7-10, as it argued in the Circuit Court of Appeals. Respondent contends that the attachment was wilful and intentional. This we concede. To quote from our brief, at page 69: "Of course, if this was a breach at all, it was an intentional breach." It is, however, our contention that it was no breach at all. We argue at page 69 that Frank L. Young Company was privileged to exercise the rights of attachment given to every creditor of McNeal-Edwards Company. This argument is answered at page 10 of respondent's brief

[1] The reference at the top of page 10 of respondent's brief to "retention of the drums for several months after they were emptied" is plainly a slip. The evidence on the point is collected in Appendix A, at pages 76-79 of petitioner's brief.

only by pointing out that petitioner's brief cites no authority. It is suggested that the burden of persuasion in establishing the validity of the defense contended for is upon the respondent, who likewise cites no authority. But petitioner further points out, at pages 69 and 70, that it has now become *res judicata* that the attachment of September 15, 1922, was no breach. This contention is not mentioned or refuted in respondent's brief.

The appositeness of Point IV of respondent's brief is not quite clear. It is there contended that petitioner's breach was not only intentional, but in bad faith—as if somehow this solved the problem. But this is not a suit in equity where the "clean hands" doctrine is applicable. Nor is it a quasi-contractual action to recover quantum meruit (petitioner's brief, pp. 63-64). It is an action at law for damages, which can be defeated only by showing a substantial breach of a promise going to the essence of the consideration. And again we point out that the breach found by the jury—*i.e.*, "an unreasonably long detention" of the drums (R. 71)—was neither "wilful" nor in bad faith according to the record (petitioner's brief, pp. 66-70).

The matters dealt with at pages 70-73 of petitioner's brief are not argued in respondent's brief, as they were not argued in the Circuit Court of Appeals, and must therefore be considered as waived.

Respectfully submitted,

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